Office-Supreme Court, U.S.
FILED
MAR 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEW MEXICO, *et al.*,
Petitioners

v.

MESCALERO APACHE TRIBE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE UINTAH AND OURAY TRIBE AS AMICUS CURIAE SUPPORTING RESPONDENT

MARTIN E. SENECA, JR.
1140 Connecticut Ave., N.W.
Suite 302
Washington, D.C. 20036
(202) 861-0415
Counsel for amicus curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
CONSENT TO FILING OF BRIEF AMICUS CURIAE	1
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	5

TABLE OF AUTHORITIES

Cases:

Alcea Band of Tillamooks v. U.S., 329 U.S. 40 (1945)	3
Bryan v. Itasca County, 426 U.S. 373 (1976)	4
Central Machinery Co. v. Arizona Tax Comm., 100 S.Ct. 2492 (1980)	4
McClanahan v. Arizona Tax Comm., 411 U.S. 164 (1973)	4
Merrion v. Jicarilla Apache Tribe, 445 U.S. 130, 154-5 (1982)	2
Montana v. United States, 450 U.S. 544 (1981)	4
Oglala Sioux Tribe v. Barta, 146 F. Supp. 917 (U.S. Dist. Ct. So. Dak. (1956))	3
Puyallup Tribe v. Dept. of Game, 433 U.S. 165 at 176-77	4
United States v. Winans, 198 U.S. 371 (1905)	3

Constitution and Statutes:

18 U.S.C. § 1165	3
18 U.S.C. § 1151, 1154(a), 1154(c)	5
25 C.F.R. § 251.6	4
25 U.S.C. § 476	2, 3
Act of July 12, 1960, 74 Stat. 469	5

Other:

II Opinions of the Solicitor 2026, Interior Department	5
F. Prucha, *American Indian Policy In the Formative Years* (1962)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-331

STATE OF NEW MEXICO, *et al.*,
Petitioners

v.

MESCALERO APACHE TRIBE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE UINTAH AND OURAY TRIBE AS AMICUS CURIAE SUPPORTING RESPONDENT

CONSENT TO FILING OF BRIEF AMICUS CURIAE

Copies of letters from both parties consenting to the filing of this brief have been filed with the Clerk.

STATEMENT OF INTEREST

Amicus Curiae, the Uintah and Ouray Tribe of the Uintah Valley Reservation in the State of Utah, is an

Indian Tribe organized under the provisions of the Indian Reorganization Act, 25 U.S.C. § 476, and possessing natural resources including hunting and fishing rights which are a vital part of the Tribe's present and planned economic enterprises.

The Uintah and Ouray Tribe supports the position of the Respondent Mescalero Apache Tribe and joins in asserting that the State of New Mexico does not possess jurisdiction to regulate the disposition of any part of the tribe's natural resources.

SUMMARY OF ARGUMENT

Wild game of a wide variety and products derived therefrom since the coming of settlers—especially with trappers and trading posts—have been articles of commerce. Trade with non-Indians involving those articles has been subject to the Indian Commerce Clause of the United States Constitution leaving the states without authority to impose their regulations and thus unduly burden or disrupt Indian commerce. See, *Merrion v. Jicarilla Apache Tribe*, 445 U.S. 130,154-5 (1982). Congress has exercised its power under the Indian Commerce Clause (a) by delineating the geographic area within which the tribe's property interests are protected; (b) by recognizing lawful authority of the tribe to grant authority or permission to non-Indians to take game on Indian trust lands; and (c) by explicitly sanctioning tribal constitutional authority to manage hunting and fishing by non-Indians. Accordingly, the state is pre-empted from regulating this principal item of Indian commerce, initially by the Indian Commerce Clause and subsequently by legislation providing for tribal regulation of its own resources.

ARGUMENT

Natural resources of the reservation are a property right of the tribe recognized by the United States upon establishment of the reservation. *United States v. Winans*, 198 U.S. 371 (1905). The game upon those reservations now and have been since the establishment of this republic articles of commerce of varying volume throughout history depending upon the time, place and market conditions. See F. Prucha, *American Indian Policy in the Formative Years*, 66-101 (1962).

Under authority of the Indian Commerce Clause, article I, § 8, cl. 3., the United States has taken these actions generally with respect to the Indian tribes of this country:

1. The United States has set aside reservations and those reservations have included the wild game thereon. *Alcea Band of Tillamooks v. U.S.*, 329 U.S. 40 (1945).

2. The United States has provided criminal sanctions for non-members of a tribe who go upon trust lands of a reservation to hunt, trap, or fish "without lawful authority or permission." 18 U.S.C. § 1165.

3. The United States has provided a statutory scheme through which procedure for granting that lawful authority or permission has been channelled; 25 U.S.C. 476. *Oglala Sioux Tribe v. Barta*, 146 F. Supp. 917, 918 (U.S. District Ct. So. Dak. (1956)).

These actions by the United States considered together, all taken under the Indian Commerce Clause, constitute a consistent, comprehensive treatment of the tribe's natural resources—resources, the land and the game thereon, which were the only thing of commercial value from the very beginning. Of course, it must be recognized that the status of reservations since their establishment has not

remained unchanged. As this Court ruled in *Montana v. United States*, 450 U.S. 544 (1981) the status of the tribe's right on the reservation was modified to the extent that land within the boundary of a reservation passed into fee simple status. That, however, has virtually no relevance here since less than 200 acres have been passed into fee simple status and there is no allegation that the hunting took place on that tract. The only other authority a state might possess would be when the tribe in effect performed the equivalent of "pursuing the last steelhead into their nets." See, *Puyallup Tribe v. Dept. of Game*, 433 U.S. 165 at 176-77. Those circumstances are absent here.

The item involved here, tribal game, contrasts sharply, in terms of traditional tribal property rights, with other items involved in jurisdictional conflicts with states. See, e.g., *Bryan v. Itasca County*, 426 U.S. 373 (1976) (trailer house); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) (monetary income); and *Central Machinery Company v. Arizona Tax Commission*, 100 S. Ct. 2492 (1980) (farm tractors). In *Central Machinery Company* this Court noted that the Indian trader statutes applied to an unlicensed salesman (conceivably an itinerant peddler under the regulations) and, giving the statutes 'a sweep as broad as [their] language', it was "the existence of Indian trader statutes . . . and not their administration . . . that pre-empts the field of transactions with Indians occurring on the reservation." Id. at 2595-2596. It should be noted that the regulations also contemplate purchase from Indians. 25 C.F.R. § 251.6. It would be difficult for Indians to accept, in view of the recent cases, that such recent acquisitions in their history as trailer houses, money income and farm tractors could be protected from intrusive regulation by states but an article which has been with them since their existence on this continent would be taken over by state governments.

The recognition of tribal right to grant authority or permission to take game on its lands by the Act of July 12, 1960, 74 Stat. 469, resembles in some respects the delegation of authority to permit non-Indians to establish a liquor store on the reservation. See 18 U.S.C. §§ 1151, 1154(a) and 1154(c). In that legislation Congress provided that the permission should be "in conformity both with the laws of the state . . . and an ordinance duly adopted by the tribe . . . The Congress made no provision for conformance with state laws in the legislation here involved. Moreover, the "conforms with state law" language has been viewed not as granting state authority over the activity but as a guideline. II Opinions of the Solicitor 2026, Interior Department.

This area of commercial activity with Indian tribes ought not by judicial fiat be thrown to the states which long have been hostile to the Indian tribes in their midst. If any transfer of this area of commerce is to be made it should be by Act of Congress where the tribes might have a voice in formulating the conditions upon which the states might acquire some control over their natural resources.

CONCLUSION

For the foregoing reasons the judgment of the Tenth Circuit should be sustained.

MARTIN E. SENECA, JR.
1140 Connecticut Ave., N.W.
Suite 302
Washington, D.C. 20036
(202) 861-0415

Counsel for amicus curiae